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II. REVIEW OF THE DRART ARTICLE IN PART ONE (continued)

D. Countermeasures as provided for in Part One, Chapter V and Part Two, Chapter III

357. Article 30, which is contained in Chapter V of Part One, deals with acts which are a "legitimate" countermeasure under international law in response to wrongful conduct on the part of other States. It provides that the wrongfulness of such acts by way of countermeasure is precluded, and thus no responsibility arises with respect to them. 685/ In the Draft articles as adopted on first reading this was emphasized by article 35, which preserved the possibility of compensation for actual harm arising from conduct covered by certain other articles in Part V, but not for harm caused by countermeasures or self-defence. 686/

358. In its subsequent work on Part Two of the Draft articles, the Commissio went on to deal in some detail with countermeasures, following detailed reports on that subject by Mr. Arangio-Ruiz. 687/ The relevant provisions, which were adopted only after substantial debate and in some cases on the basis of votes taken in plenary, 688/ are contained in Chapter III of Part Two. They comprise articles 47-50. These articles also need to be read in the context of Part Three dealing with settlement of disputes.

The definition of countermeasures

359. According to article 47 (1), countermeasures are taken when "an injured State does not comply with one or more of its obligations towards a State which has committed an internationally wrongful act". Their purpose is to induce the latter State (hereafter referred to as the target State) to comply with its obligations of cessation and reparation, and they may be taken for as long as those obligations have not been complied with and the countermeasures remain "necessary in the light of any response to the demands of the injured State". Thus countermeasures are seen as essentially remedial rather than punitive in their purpose, but on the other hand there is no specific limit on the obligations which may be disregarded by way of countermeasure. In particular, the notion of "reciprocal countermeasure", earlier developed by Special Rapporteur Riphagen, was not adopted. 689/

685/ See above, para. 242.

686/ See above, para. 303.

687/ See Arangio-Ruiz, Third Report, Yearbook ... 1991, vol. II, Part One, p. 1; Fourth Report, Yearbook ... 1992, vol. II, Part One, p. 1.

688/ See Yearbook ... 1993, vol. II, Part Two, p. 11; Yearbook ... 1994, vol. II, Part Two, p. 136; Yearbook ... 1995, vol. II, Part Two, p. 43 at p. 61, para. 339.

689/ See above, para. 323.

360. Article 30 has already made it clear that countermeasures only preclude wrongfulness in the relations between an injured State and the State which has committed the internationally wrongful act. The implications so far as third States are concerned are spelled out in article 47 (3), which provides that countermeasures against State A cannot justify "a breach of an obligation towards a third State". On the other hand indirect or consequential effects of countermeasures on a third State, or on third parties generally, which do not involve an independent breach of any obligation are not covered by this proviso.

361. Articles 48-50 impose a range of restrictions and qualifications on the taking of countermeasures, in the interests of avoiding their abuse and of limiting them to the purposes specified in article 47. These are both substantive and procedural. In the debate on countermeasures on first reading, the procedural issues were in fact the more controversial.

Substantive limitations on countermeasures

362. The first substantive limitation, which is well established as a matter of general international law, is that of proportionality. It is formulated in the negative in article 49: countermeasures "shall not be out of proportion to the degree of gravity of the internationally wrongful act and the effects thereof on the injured State". The use of the term "and" indicates that both the seriousness of the breach and the extent to which it affects the injured State are relevant for this purpose.

363. A number of additional substantive limitations are spelled out in article 50, which is entitled "Prohibited countermeasures". Some of these are self-evident. Countermeasures may not involve "the threat or use of force as prohibited by the Charter of the United Nations" (art. 50 (a)), or "any other conduct in contravention of a peremptory norm of general international law" (art. 50 (e)). Nor may they involve "any conduct which derogates from basic human rights" (art. 50 (d)). Thus belligerent reprisals involving the use of force are excluded. A further specific prohibition relates to "conduct which infringes the inviolability of diplomatic or consular agents, premises, archives and documents" (art. 50 (c)). But there is no specific exclusion of conduct involving a breach of international humanitarian law norms.

364. In addition, article 50 (b) prohibits "extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State which has committed the internationally wrongful act". The use of the term "extreme" here implies that even ordinary countermeasures may be coercive, and indeed since they are designed to induce the target State to comply with its international obligations, it may be that they are coercive by definition.

365. The Draft articles do not deal with the possibility that countermeasures may be expressly or implicitly excluded by the obligation in question. There was no need to do so with respect to non-derogable human rights, since they are already covered by the broader language of article 50 (d). But obligations which fall within the International Court's description of "obligations of total restraint" might also be thought expressly or impliedly

to exclude countermeasures. 690/ It is true that the category of "obligations of total restraint" was expressed to deal with limitations on action in self-defence, but the same idea would seem to apply a fortiori to action taken by way of countermeasures.

Procedural conditions on the taking of countermeasures

366. The procedural consequences of taking countermeasures are spelled out in article 48. In the form finally adopted, article 48 distinguishes between "interim measures of protection", which may be taken by the injured State immediately upon the commission of an internationally wrongful act by the target State, and full-scale countermeasures, which can only be taken after negotiations to resolve the dispute, as required by article 54, have taken place and have not succeeded. The distinction was introduced late in the debate on countermeasures, after the Commission had voted by a narrow majority to require negotiation as a necessary prerequisite to the taking of countermeasures. 691/ "Interim measures of protection" are defined as measures "which are necessary to preserve its rights and which otherwise comply with the requirements of this Chapter". This language is not very clear, since under article 47 all countermeasures, to be lawful, have to be necessary to ensure that the injured State's rights to cessation and reparation under articles 41-46 are respected, and to that extent all countermeasures are, by definition, measures which are "necessary to preserve [the] rights" of the injured State. Although it is not stated in so many words, "interim measures" seem to be measures which are necessary to protect the right of the injured State to take countermeasures if negotiations fail. The intention was evidently to allow immediate measures to be taken in relation to items which might otherwise be removed from the territory of the injured State and be no longer available as a subject of countermeasures. Examples include the freezing of assets or bank accounts or the detention of a ship or aircraft. The use of the phrase "interim measures of protection" has obvious overtones of judicial measures, such as those referred to in article 41 (1) of the Statute of the International Court of Justice or article 290 of the United Nations Convention on the Law of the Sea. But while there may be some analogy between the two situations, it is not a close one. Article 48 is concerned with unilateral measures taken by a State at its own risk in response to wrongful conduct, measures which would themselves otherwise be internationally wrongful. Provisional measures ordered or indicated by an international court or tribunal are by definition not unilateral, and would hardly authorize conduct not otherwise in conformity with the international obligations of the State party taking them. "Interim measures of protection" as envisaged in article 48 (1) are closer to a form of unilateral saisie conservatoire such as that which may be available to the holder of a lien under national law.

367. Assuming that negotiations have taken place and have not succeeded in resolving the dispute, article 48 contemplates that countermeasures may then be taken, to the full extent allowed by the other articles of Chapter III.

690/ See above, para. 299.

691/ See Yearbook ... 1996, vol. I, p. 171.

Thereafter measures of dispute settlement may be pursued concurrently with those countermeasures, rather than as a necessary prerequisite. But it goes on to provide that the taking of countermeasures entails an obligation of dispute settlement as set out in Part Three, if no other "binding dispute settlement procedure" is in force between the injured State and the target State in relation to the dispute (see art. 48 (2)). In order to see how this system is to work, it is necessary to outline the provisions of Part Three, which is entitled "Settlement of disputes".

368. Part Three provides for a three-stage process. The first involves conciliation by a Conciliation Commission (see arts. 56-57 and Annex I). If neither party submits the dispute to conciliation, or there is no agreed settlement within six months of the report of the Commission, the parties may agree to refer the dispute to arbitration (see arts. 58-59 and Annex II). A challenge to the validity of the arbitral award may be instituted by either party: such challenges go to the International Court, unless the parties have within three months agreed on some other forum (art. 60). Thus according to Part Three, arbitration is normally dependent on the consent of the parties, but if they agree, their consent carries with it the compulsory jurisdiction of the International Court with respect to any dispute over the validity of the resulting award.

369. However special provision is made for countermeasures in article 58 (2):

> "2. In cases, however, where the dispute arises between States Parties to the present articles, one of which has taken countermeasures against the other, the State against which they are taken is entitled at any time unilaterally to submit the dispute to an arbitral tribunal to be constituted in conformity with annex II to the present articles."

This is the only provision for compulsory settlement of disputes in the Draft articles, and it arises only when one State party has taken countermeasures against another. Evidently it sidesteps the procedure of the Conciliation Commission. Paragraph 2 does not precisely define "the dispute" which is to be submitted to arbitration. It seems clear that it includes the underlying dispute over the (alleged) internationally wrongful act, i.e. the dispute which has led to the taking of countermeasures. But does it also include any consequential dispute (a dispute which is highly likely to arise in practice), for example over whether the countermeasures taken are lawful in terms of the requirements of Chapter III? In other words does "the dispute" include such questions as whether the countermeasures are proportionate, whether they are prohibited by article 50, whether there was a genuine attempt at prior negotiation, and if not, whether the countermeasures qualify as "interim measures" within article 48 (1)? Either view might be defended textually. In favour of the narrower view (i.e. the view that "the dispute" is limited to the underlying dispute arising from the internationally wrongful act) is the point that the obligation of dispute settlement arises as soon as countermeasures have been taken, yet the question of the lawfulness of the countermeasures might depend upon subsequent facts - e.g. facts relevant to the disproportionate effects of the countermeasure on the injured State. In favour of the wider view is the point that the dispute is only referred to arbitration at a time when the countermeasures have actually been taken: moreover it would be unfair and unbalanced to require the target State to

submit to arbitration the issue of the wrongfulness of its own conduct, without being able to test the wrongfulness of the conduct taken by the injured State in response. Probably the wider view is the better one. But there are limits, in any event, on the scope of the obligation to arbitrate. For example, it does not seem to extend to counterclaims which the target State may have against the injured State in respect of the underlying dispute.

370. Article 48 goes on to regulate the extent to which countermeasures may be maintained in force pending arbitration. Under article 48 (3), countermeasures must be suspended "when and to the extent that" the target State is cooperating in the arbitral process. But the obligation to suspend countermeasures terminates if the target State fails to comply with a request or order made by the tribunal, e.g. an order or request for provisional measures, and it apparently does not revive (see art. 48 (4)). These provisions only apply if the internationally wrongful act of the target State has ceased, i.e. they do not apply to continuing wrongful acts which the target State has not withdrawn. The distinction between continuing and completed wrongful acts has been dealt with above, and endorsed in principle. 692/ In practice, what is a continuing wrongful act depends to some extent on the way in which the injured State formulates its demands, so that the requirement of suspension of countermeasures under article 48 (3) may not apply in many cases.

Countermeasures in relation to "international crimes" as defined in article 19

371. Chapter IV of Part Two, which is entitled "International Crimes", spells out the specific consequences of international crimes of States, as defined in article 19 adopted on first reading. The paucity of those consequences, as contrasted with the gravity of the concept of crime so defined, has already been analysed. 693/ Chapter IV modifies two of the limitations on reparation contained in Chapter II, 694/ and to that modest extent it creates a specific regime of reparation in relation to "State crimes". But it makes no such modifications in relation to Chapter III, so that there are, according to the Draft articles, no special aggravating consequences of State crime in the field of countermeasures. It is true that under the definition of "injured State" in article 40 "all States" are defined as injured by a crime, and that therefore all States have the individual right to seek reparation for, and to take countermeasures in response to, a crime. The Draft articles, however, contain no provision dealing with the possible consequences of many States taking countermeasures in response to a wrongful act described as a "crime", except perhaps for article 53 (d) which provides that States should "cooperate with other States in the application of measures designed to eliminate the consequences of the crime". It appears that proportionality under article 48 is judged on a bilateral basis, as between the injured State and the target

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692/ See above, paras. 93-113.

693/ See the present Special Rapporteur's First Report, A/CN.4/490, paras. 51, 84-86.

694/ See art. 51, referring to the limitations contained in art. 43 (c) and (d) and art. 45 (3).

State, so that there is no mechanism for assessing the overall proportionality of conduct taken by way of "collective countermeasures". This is however a broader consequence of the width of the definition of "injured State", and of the fact that all injured States are treated by article 40 in the same way, whether the internationally wrongful act specifically concerns them or whether they are reacting, as it were in the public interest, to a grave breach of international law or of human rights.

372. In 1998 the Commission decided to set aside the notion of State crime for the time being, and to explore "whether the systematic development in the Draft articles of key notions such as obligations erga omnes, peremptory norms (jus cogens) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19". 695/

1. Reflections on the treatment of countermeasures in Part Two

373. It is proposed in this section to review a number of the general issues raised by the treatment of countermeasures in Part Two. There are two principal questions to be decided at this stage: (1) whether to retain the treatment of countermeasures, and (2) how to deal with the explicit linkage between countermeasures and dispute settlement, given that the status of Part Three, and the form of the Draft articles themselves, are unresolved. There is a further and consequential question, left open in the discussion of Chapter V of Part One, viz., the precise formulation of article 30.

(a) Comments of Governments

374. The comments of Governments on countermeasures have been both general and specific in character. Whatever their purpose and content, they clearly show that States consider countermeasures as a key issue in the context of the Draft articles on State responsibility.

375. At the general level a number of Governments stress that the treatment of countermeasures in Part Two, with its emphasis on settlement of disputes, implies that the Draft articles would necessarily take the form of a convention. Thus Germany notes that "The Commission will have to bear in mind that the format of the project will have an impact on Part Three on dispute settlement and, by extension, on Part Two on countermeasures as well". 696/

376. Governments have also expressed their concerns as to the relationship between the settlement of disputes and the regime of countermeasures. Article 58, paragraph 2, is particularly criticized in that respect: whereas

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695/ See ILC Report (1998), p. 147, para. 331.

696/ A/CN.4/488, p. 24. See also comments made by Italy (A/CN.4/488/Add.2, p. 7) and Singapore (referring to the World Trade Organization procedures; A/CN.4/488/Add.3, pp. 3-4).

a few Governments are in favour of its retention, 697/ many others have pointed out that it "could incite a State to take countermeasures to force another State to accept recourse to arbitration". 698/ Such a provision would then contradict the need to limit recourse to countermeasures. Indeed it could create "a certain imbalance between the right of the wrongdoing State to take the case to arbitration, whereas the injured State does not have this right when the original dispute as to the responsibility of the wrongdoing State arises". 699/ Several Governments call, if not for its deletion, 700/ at least for careful reconsideration.

377. It is not the function of this addendum to make proposals for each of the articles on countermeasures in Part Two, but it is useful to summarize the tenor of the specific comments made so far, 701/ especially since these concern not only the formulation of the articles but their place in the Draft as a whole.

378. A first distinction is to be drawn between Governments which favour the general approach taken by the Commission and those which have expressed doubts about it. Among the former, Germany considers the relevant provisions in the Draft as "generally striking a careful balance between the rights and interests of injured States and those States finding themselves at the receiving end of such countermeasures". 702/ Among the latter, critics and concerns proceed from different, indeed sometimes opposite, perspectives. The United States, for example, "believe that the Draft articles contain unsupported restrictions" 703/ on the use of countermeasures and, consequently, that the Commission should "delete or substantially revise the prohibitions" 704/ on them. By contrast, Argentina calls for a careful reconsideration of the topic by the Commission, so as to "reverse the presumption of the lawfulness of countermeasures by providing that, while

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697/ See comments of Switzerland (A/CN.4/488, pp. 144-145) and Germany (ibid., p. 149). For Argentina, "[c]ountermeasures and compulsory arbitration should be regarded as two sides of the same coin" (A/CN.4/488/Add.1, p. 9).

698/ In the words used by France (A/CN.4/488, p. 149). See also comments made by Mexico and the United Kingdom (ibid., pp. 149-150).

699/ Denmark on behalf of the Nordic countries (A/CN.4/488, p. 149). See also United States of America (ibid., p. 123) and Japan (A/CN.4/492, p. 17).

700/ As suggested by Mexico (A/CN.4/488, p. 149).

701/ As to comment on specific articles, those relating to article 30 have already been mentioned (this Report, Add.2, p. 16, paras. 246-247).

702/ A/CN.4/488, p. 115. See also Czech Republic (ibid., p. 114), Mongolia (ibid., p. 116) and Japan (A/CN.4/492, p. 15).

703/ A/CN.4/488, p. 29

704/ Ibid., p. 116.

States do not have a right to take them, in certain cases, under circumstances of exceptional gravity, their use is not unlawful". 705/ Other States are of the opinion that the issues raised by countermeasures would be "more appropriately addressed in a specialist forum" 706/ or should be dealt with by the Commission within the context of a separate study, and they therefore support the entire deletion of articles 47-50. 707/ But Italy, among others, strongly opposes that view and considers it "of the utmost importance that the countermeasures regime (for example, conditions relating to resort to countermeasures, and prohibited countermeasures) should be codified". 708/

379. Whatever their position as to the proper treatment of countermeasures in the Draft articles, Governments have also expressed opinions about specific issues related to them. These include:

- the difficulty of distinguishing in practice between countermeasures and interim measures of protection referred to in article 48, paragraph 1; 709/

- "the key issue of whether the measures taken should be related or have some nexus to the right infringed"; 710/

- the eventuality of "collective measures" 711/ and of countermeasures in case of breach of multilateral or erga omnes obligations; 712/

- the potential effects of the distinction between crimes and delicts upon the regime of countermeasures, 713/ and, more

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705/ A/CN.4/488/Add.1, p. 8. See in that respect the comment made by the Czech Republic (A/CN.4/488, p. 114).

706/ As stated by Singapore (A/CN.4/488/Add.3, p. 5).

707/ This option is proposed by France and the United Kingdom, the latter being however satisfied with the present drafting of article 30; see A/CN.4/488, pp. 22, 83, 115 (France) and ibid., pp. 83, 116 (United Kingdom).

708/ A/CN.4/488/Add.2, p. 5. See also Ireland (A/CN.4/488, p. 115).

709/ This is especially a matter of concern for Ireland (A/CN.4/488, p. 120), Germany, the United Kingdom and the United States (ibid., p. 122) and Japan (A/CN.4/492, pp. 15-16). Contra, see comment of Argentina (A/CN.4/488/Add.1, p. 8).

710/ As Singapore puts it (A/CN.4/488/Add.3, p. 5).

711/ Japan (A/CN.4/492, pp. 11-12).

712/ See United Kingdom (A/CN.4/488, p. 116).

713/ See e.g. Mongolia (A/CN.4/488, p. 116) and Greece (A/CN.4/492, p. 15).

generally, the question whether countermeasures should be conceived as having a punitive function; 714/

- the position of third States; 715/

- the impact of countermeasures on the economic situation of the target State 716/ and on human rights; 717/

- the influence of countermeasures in aggravating inequalities between States, since resort to countermeasures "favours the powerful countries". 718/

(b) Developments in the law and practice relating to countermeasures

380. The law and literature on countermeasures are thoroughly reviewed in Mr. Arangio-Ruiz' Third and Fourth Reports, and it is not necessary to revisit them at this stage. Since the Commission completed the first reading of the Draft articles, however, the International Court has considered the question for the first time, and its handling of it is of particular interest.

381. In the Case concerning the Gabcikovo Nagymaros Project, the Court had to decide upon the legality of "Variant C", the unilateral diversion of the Danube through the Gabcikovo power plant. 719/ Czechoslovakia had taken that action following Hungary's refusal to proceed with the works assigned to it under the 1977 Treaty, relying on several arguments but not explicitly on the argument that the implementation of Variant C was a countermeasure. In its argument before the Court, Slovakia similarly "did not invoke the plea of countermeasures as a primary argument, since it did not consider Variant C to be unlawful", but it did express the view that "Variant C could be presented as a justified countermeasure to Hungary's illegal acts". 720/ The Court having held that Hungary's refusal to continue the works could not be justified, but that Variant C was itself an internationally wrongful act, went

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714/ See the differing views expressed by Denmark on behalf of the Nordic countries (A/CN.4/488, p. 114), Ireland (ibid., p. 118), on the one hand, and France (ibid., p. 115) on the other.

715/ Denmark on behalf of the Nordic countries (A/CN.4/488, p. 118) and Singapore (A/CN.4/488/Add.3, p. 6).

716/ Ireland, Switzerland, United Kingdom, United States (A/CN.4/488, p. 130), Singapore (A/CN.4/488/Add.3, p. 6) and Japan (A/CN.4/492, p. 16).

717/ Ireland (A/CN.4/488, p. 126), United Kingdom, United States (ibid., p. 132) and Japan (A/CN.4/492, p. 16).

718/ Denmark on behalf of the Nordic countries (A/CN.4/488, p. 115), Argentina (A/CN.4/488/Add.1, p. 7) and Singapore (A/CN.4/488/Add.3, p. 6).

719/ For the facts in further detail see above, paras. 103-104.

720/ ICJ Reports 1997, p. 3 at para. 82.

on to consider whether Variant C could be justified as a countermeasure. In the first place it referred to two conditions for justified countermeasures which were satisfied in the circumstances:

> "In order to be justifiable, a countermeasure must meet certain conditions ... In the first place it must be taken in response to a previous interr tional wrongful act of another State and must be directed against that State. Although not primarily presented as a countermeasure, it is clear that Variant C was a response to Hungary's suspension and abandonment of works and that it was directed against that State; and it is equally clear, in the Court's view, that Hungary's actions were internationally wrongful. Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. It is clear from the facts of the case ... that Czechoslovakia requested Hungary to resume the performance of its treaty obligations on many occasions." 721/

However, the Court held that Czechoslovakia's actions failed to fulfil a third criterion, that of proportionality, and they were accordingly unlawful.

> "In the view of the Court, an important consideration is that the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question ... The Court considers that Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube - with the continuing effects of the diversion of these waters on the ecology of the riparian area of the Szigetköz - failed to respect the proportionality which is required by international law ... The Court thus considers that the diversion of the Danube carried out by Czechoslovakia was not a lawful countermeasure because it was not proportionate. It is therefore not required to pass upon one other condition for the lawfulness of a countermeasure, namely that its purpose must be to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible." 722/

382. Thus the Court, in a bilateral context in which no issue of prohibited countermeasures in article 50 were at stake, endorsed four distinct elements of the law of countermeasures: (a) the countermeasure must be taken in

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721/ Ibid., paras. 82-84. In support of its statement of the law of countermeasures the Court referred generally to its Nicaragua judgment, ICJ Reports 1986, p. 127, para. 249; the United States-France Air Services Arbitration (1978) 18 UNRIAA, pp. 443 et seq., and to the ILC's Draft articles 47-50.

722/ Ibid., paras 85, 87. The Court referred to the importance of the equality of the parties in control of the waters of an international watercourse, and noted also that Hungary's consent to the diversion of water from the Danube had been within the framework of a joint project and not a unilateral diversion.

response to an unlawful act; (b) it must be preceded by a demand for compliance by the injured State; 723/ (c) the countermeasure must be proportionate, in the sense of "commensurate with the injury suffered, taking account of the rights in question"; and (d) the countermeasure must have as its purpose "to induce the wrongdoing State to comply with its obligations under international law, and that the measure must therefore be reversible". In particular, the Court accepted the conception of countermeasures underlying article 47, as well as the requirement of proportionality (while adding useful clarifications in relation to the latter, and adopting a stricter approach than the language of article 49 might suggest). It took a slightly different approach to the question of prior notification, dealt with in article 48, which will deserve careful consideration as an alternative to the existing formulation. Overall its position was a balanced one. On the one hand it did not doubt that countermeasures may justify otherwise unlawful conduct, to the extent of making such conduct "lawful" (as distinct from "legitimate", the term used in article 30 but avoided in the judgment), and it conceived of countermeasures as falling properly within the scope of the State responsibility. On the other hand, it formulated relatively strict, cumulative requirements for lawful countermeasures and applied them rigorously to the facts of the case, drawing inter alia on the Commission's earlier work.

(c) Particular issues raised by articles 47-50

383. The review of articles 47-50 undertaken so far suggests that a number of issues are left unresolved by the Draft articles, especially on matters of procedure. But these should not be allowed to obscure the value of these Draft articles as a first attempt to formulate the international law rules governing the practice of countermeasures. That practice is rather widespread, is directly related to issues of State responsibility, and has given rise to concerns as to its possible abuse. In formulating articles 30 and 47-50, the Commission succeeded in producing a measure of agreement on key questions, as to which earlier practice and decisions were uncertain or equivocal. In particular the following points appear to be generally accepted:

- Countermeasures can only be justified in response to conduct which is internationally wrongful in law and in fact. The belief of the "injured" State in the wrongfulness is not a sufficient basis. Thus "an injured State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for an unlawful act in the event of an incorrect assessment". 724/

723/ The Court did not mention any requirement of prior negotiations, although in that case there had been extensive negotiations.

724/ Commentary to article 47, para. (1). The earlier dictum to the contrary in the Air Services Arbitration (United States/France) thus does not reflect international law.

- Countermeasures are not limited to "reciprocal" measures in relation to the same or a related obligation. This enables a clearer distinction to be drawn between countermeasures and the application of the exceptio inadimpleti contractus. 725/

- The principle of proportionality is a key limiting constraint on the taking of countermeasures. The International Court has given further guidance on its application by reference to the notion of "commensurability" and the requirement that the effects of a countermeasure should as far as possible be reversible in their effects. 726/

- The purpose of countermeasures is to induce the target State to cease its unlawful conduct and to provide appropriate reparation.

The comments of governments, summarized above, raise a number of particular points about the formulation of articles 47-50. For the most part these can be reflected in specific changes to the text or the commentary: this will be a matter for the Commission at its fifty-second session, assuming that it is decided to retain the detailed provisions on countermeasures in articles 47-50. Two general matters have however given rise to widespread concern and should be dealt with at this preliminary stage.

(i) Dispute settlement and the form of the Draft articles

384. A key question in the formulation of the provisions on countermeasures relates to the explicit link drawn between the taking of countermeasures and compulsory arbitration. The existing provisions are drafted on the assumption that the Draft articles will be adopted as a convention rather than, for example, as a declaration annexed to a resolution of the General Assembly. As many governments have noted, this is a controversial assumption, and in any event the Commission has not yet decided on the form in which the Draft articles should be recommended to the General Assembly. It does not seem desirable to propose texts dealing with any specific issue, such as countermeasures, if those texts assume that only one possible solution is open as to the form of the Draft articles.

385. There are, moreover, specific difficulties with the current linkage between countermeasures and dispute settlement, which make those linkages problematic, whatever position may be taken on the general issue of the form of the Draft articles. These concern both "interim measures" and the general regime of countermeasures.

386. The last-minute inclusion of the notion of "interim measures" in article 48, and the difficulties with the terminology, have already been mentioned. The language of "interim measures" is potentially misleading, but

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725/ See above, paras. 322-323. The Commission has decided to defer consideration of the formulation of the exceptio, pending conclusions on the content and formulation of the articles on countermeasures.

726/ See above, para. 381.

it is also unhelpful, since it fails to provide any criterion for distinguishing between "interim" and other forms of countermeasure. All countermeasures are intended to induce the target State to cease the wrongf conduct and to provide reparation, and thus to protect the rights of the injured State in that regard. All countermeasures are instrumental and thu their effects should be, as far as possible, reversible - as the Court held the Gabcikovo-Nagymaros case. 727/ In that important sense all countermeasures are "interim" measures, which envisage the normalization of relations through the resolution of the underlying dispute. 728/ Thus the second sentence of article 48 uses a misleading term to indicate a so far undefined concept, and it clearly needs to be revisited. A simple solution would be to follow the Court's requirement that before taking countermeasur the injured State must at least have called on the wrongdoing State to comp with the relevant primary rule or to offer reparation.

387. Turning to the general regime of countermeasures, the position here i at least as problematic. In one sense to make a connection between the tak of countermeasures and resort to arbitration may be seen as progressive, as step towards moderating the old system of "reprisals", and as contributing towards the peaceful settlement of international disputes. It recalls the connection made, exceptionally, in the Vienna Convention on the Law of Treaties between compulsory third party settlement and the invocation of a peremptory norm (jus cogens) as a ground for the invalidity of a treaty. 729 That procedure, which has never been invoked, can be defended as maintainin the stability of treaty relations. 730/ By contrast the linkage of countermeasures with compulsory arbitration has serious disadvantages and could be a cause of instability. The essential difficulty is that only the target State is entitled to commence compulsory arbitration after countermeasures have been taken, and this places the two disputants in position of inequality that it is difficult to defend by any principle. Why should the State which has allegedly committed an internationally wrongful a be entitled to require the injured State to arbitrate the dispute, but the injured State not have the same right? An injured State seeking third party settlement of a dispute thus has an incentive to take countermeasures (even, perhaps, excessive or disproportionate countermeasures) in order to induce the target State to commence arbitration. It should be the policy of international law to discourage resort to countermeasures, but in this respe

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727/ Ibid.

728/ See further J. Crawford, "Counter-measures as Interim Measures" (1994) 5 European Journal of International Law p. 65.

729/ See Vienna Convention on the Law of Treaties, 1969, arts. 53, 64 66. In that case the linkage with dispute settlement was made not by the IL but by the Vienna Diplomatic Conference.

730/ There is an element of paradox in providing, on the one hand, th the parties to a treaty cannot, on pain of invalidity, opt out of certain peremptory norms of interest to the international community as a whole, and the other hand restricting challenges to invalid treaties to the parties thereto.

the Draft articles may tend to encourage them. The Draft articles deliberately do not require third party judicial settlement of disputes concerning State responsibility, but since countermeasures can be taken, in principle, in relation to any breach of an international obligation, the effect of article 58 (2) is arguably to introduce such a system by the back door, and in an unequal way. There are also technical difficulties with triggering an obligation to arbitrate by reference to the taking of countermeasures: for example, a State which declines to characterize its conduct as a countermeasure may thereby escape that obligation, 731/ and there are difficulties with respect to issues such as counterclaims, which are not provided for in the existing text. 732/ For all these reasons, the Special Rapporteur is firmly of the view that the linkage between the taking of countermeasures and compulsory arbitration should not be retained.

(ii) The balance between "injured" and "target" States

388. A second point of widespread concern relates to the de facto inequality which countermeasures imply, since almost by definition the most powerful States will have the greatest scope and capacity to take countermeasures. It was precisely that consideration which led the Commission on first reading to introduce a special regime of compulsory arbitration in cases where countermeasures have been taken. But the States which have expressed this concern generally do not support the view that countermeasures should be deleted from the Draft articles. In particular, in the Special Rapporteur's view article 30 cannot be deleted without "decodifying" international law. But once the principle of article 30 is accepted, it is desirable that appropriate limits be set on resort to countermeasures, and in particular that their relationship to cessation and restitution be established. This is a proper task of the Draft articles: for the Commission now to decline to carry it through would only tend to accentuate the inequality inherent in the capacity to take countermeasures.

2. General conclusion

(a) Options for the Commission

389. To summarize, the Commission would seem to have the following options in dealing with countermeasures:

(1) to retain article 30 in essentially its present form, but to delete the treatment of countermeasures in Part Two;

731/ An analogous problem arose in the International Tribunal of the Law of the Sea in the Case of the MV Saiga (Application for Prompt Release): see the Tribunal's judgment of 4 December 1997, para. 72, where the Tribunal held that "given the choice between a legal classification that implies a violation of international law and one that avoids such implication it must opt for the latter". On this point the Tribunal divided 12-9.

732/ See above, para. 391. In many State responsibility cases in which countermeasures have been taken, issues of potential counterclaims will arise.

(2) not to deal with countermeasures in Part Two, but to incorporate substantial elements of the legal regime of countermeasures into article 30;

(3) to engage in a substantial treatment of countermeasures in Part Two, along the lines of the present text, including the linkage with dispute settlement (but without prejudice to other issues which have been raised as to specific articles);

(4) to deal with countermeasures in Part Two, dealing with the various criticisms that have been made of articles 47-50, but avoiding any specific linkage with dispute settlement.

390. The Special Rapporteur prefers the fourth of these options. The subject of countermeasures in response to an internationally wrongful act is properly regarded as within the field of State responsibility, and it has always been envisaged that it would be included in Part Two of the Draft articles. The link established in article 47 between countermeasures, cessation of the wrongful conduct and reparation is helpful, and overall the provisions on countermeasures seem to have had a beneficial effect in consolidating the law, as the Court showed in the Gabcikovo-Nagymaros case. There is widespread concern among States and commentators as to the potential for abuse of countermeasures. But there is also a general recognition that the institution of countermeasures exists in international law, a recognition reflected in the Commission's decision in principle to retain article 30 within Chapter V. In the Special Rapporteur's view, it would be inappropriate to recognize that countermeasures are a circumstance precluding wrongfulness within the law of State responsibility - i.e. that they may constitute an excuse or justification for wrongful conduct - and not at the same time to spell out at least the main legal limitations upon the taking of countermeasures. 733/ It is true that there are difficulties with the articles 47-50, in particular the linkage with dispute settlement and the failure to deal with problems arising from "collective" countermeasures in situations where there are many "injured States". But these difficulties can be resolved in the framework of the consideration of Part 2, and in the case of "collective" responses to breaches of obligation erga omnes they will have to be addressed in any event, in the context of article 40 and the incidence of obligations erga omnes.

391. There is admittedly a slight awkwardness in referring to countermeasures first of all in the somewhat "incidental" context of article 30, before going on to deal with them in further detail in Part Two, and this might be a reason

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733/ As noted above (para. 293), the analogy between self-defence and countermeasures does not require the adoption of the same approach to both in the framework of Chapter V of Part 1. The law of self-defence is relatively well developed and is incorporated in article 51 of the Charter. Nor has the law of self-defence ever been treated as an aspect of the law of State responsibility, as distinct from a point of reference. In all these respects the position of countermeasures is different.

for preferring Option 2 above. 734/ But the difficulty seems essentially presentational, and the main focus of countermeasures should be on their instrumental purpose in relation to cessation and reparation, rather than their incidental effect as circumstances precluding wrongfulness. This is perhaps the principal advance made in articles 47-50: countermeasures are seen in relation to the obligations of cessation and reparation set out in Part Two, and not simply as a diffuse and relatively indiscriminate form of sanction, reprisal or penalty. In these circumstances it is difficult to avoid referring to the secondary obligations arising from an internationally wrongful act, as set out in Part Two. Overall this consideration is insufficient to tilt the balance in favour of option 2 as set out in paragraph 389 above.

(b) The formulation of article 30

392. If this recommendation is accepted, it becomes possible to recommend the precise terms of article 30, a matter postponed in the Second Report for reasons already explained. 735/ The Special Rapporteur agrees with the suggestions made by some governments that article 30 should cross-refer to the treatment of countermeasures in Part Two, and that it should distinguish between countermeasures and the "measures" taken by or under the auspices of international organizations under their own constituent instruments. 736/ On that basis he proposes the following text for article 30:

> The wrongfulness of an act of a State not in conformity with an international obligation of that State is precluded if and to the extent that the act constitutes a lawful countermeasure as provided for in articles [xx]-[xx].

734/ References to later articles of a law-making text, while they may be awkward, are certainly not unknown: see e.g. Vienna Convention on the Law of Treaties, 1969, arts. 17 (1), 27, 44 (1), (4) and (5), 45, 48 (3).

735/ See above, para. 248.

736/ For these comments see above, Second Report, paras. 246-7, and this Addendum, paras. 374-379.